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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 35306-1-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DONALD LEROY BROERS,

Defendant/Appellant

Respondent's Brief

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I. ISSUES PRESENTED

1. *Whether including language in the value instruction regarding common scheme or plan constitutes harmless error where the theft was the taking of multiple items on a single occasion from a single victim and all elements of the crime, including value, were proved beyond a reasonable doubt?*
2. *Whether the jury is the arbiter of what value is to be assigned property where the parties present evidence of alternate, but factual viable methods of calculating value?*

II. STATEMENT OF THE CASE

On November 3, 2016 Donald Broers entered Valley Vision and Hearing Associates in Ellensburg, Washington. RP 84, 100-101. As the name may imply, Valley Vision and hearing is an optical store employing opticians and staff. RP 84-85. In preparation for opening the business on that day an optician confirmed the retail floor of the business was fully stocked with the available frame products made available for sale to the public. RP 85-87.

Mr. Broers entered the store and raised the suspicion of an employee who had noticed a couple of frame products missing from the floor. RP 87. After Mr. Broers left the store, surveillance video was reviewed by employees. RP 89. Mr. Broers was observed on video taking four optical frames and leaving the business without paying for them. RP 113, 127, 141, 148. An employee testified she was certain a fifth missing item, a pair of Wiley X sunglasses, had been on the floor when the store opened. RP 88. An employee also checked the inventory sheets shortly after Mr. Broers left and confirmed that four (4) pair of frames and the sunglasses were missing from the retail area of the store. RP 127.

Mr. Broers was observed on the surveillance video stealing four of the frames. RP 127. The location within the store where the fifth pair (Wiley X Tide sunglasses) was missing was in a blind spot of the surveillance camera and therefore was not captured on the surveillance video. RP 110, 125, 127. The testimony from an employee was that she was “one-hundred percent (100%)” sure the sunglasses was in its display location when the store was opened that morning. RP 88, 1.7-11.

Mr. Broers was contacted by law-enforcement and eventually admitted to the officer he had four of the stolen frames at his home. RP 149, 152. The officer noticed during his interview of Mr. Broers that Mr. Broers was wearing a pair of prescription frames which matched the

description of one of the frame brands that was missing from Valley Vision and Hearing. RP 150.

The State's witness, Diane Woodward, testify she had been employed at the store for over four years as an optician and as part of her duties she assisted clients in choosing and fitting glasses. RP 115. Ms. Woodward testified the amount listed for the individual frames was the amount the public would be required to pay for the frames when they came into the store. RP 125, 126.

The State charged Mr. Broers with one count of Theft Second Degree under RCW 9A.56.040(1)(a). Brief of Appellant, Appendix "A". The State's proffered instruction 14 included language that "[w]henver any series of transactions that constitute theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the amount of value". RP 254.

Defendant did not object to the court's definitional instruction on value to the jury. RP 1-317. Further, the State did not argue common scheme or plan during the State's case. RP 1-317.

Defendant admitted to law enforcement officer that he had committed the theft. RP 149. The defense theory was of their case was not that the defendant hadn't taken the items but rather that the

jury should assign the value of the items based on wholesale prices rather than retail value, as had been suggested by the State. RP 274-282. Defense proposed and the court accepted, without objection from the State, a jury instruction on the lesser included offense of theft in the third degree. RP 180-181. The jury was instructed on both parties theories of the method to be used in calculating value. RP 254-257.

III. ARGUMENT

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999). *State v. Clausen*, 147 Wn.2d 620, 56 P.3d 550 (2002).

A jury instruction is subject to a harmless error analysis if the error did not relieve the State of its burden to prove each element of the charged crime. *State v. Brown*, 147 Wn.2d 330, 58 P.2d 889 (2002). A court's instructions must instruct the jury on all the essential elements of the charged crime. *State v. Linehan*, 147 Wn.2d 638, 56 P.3d 542 (2002). Failure to do so would relieve the State of its burden to prove every element beyond a reasonable

doubt. *Id.* Failure to properly instruct the jury on every element of the offense is reversible error unless the court is convinced, beyond a reasonable doubt, the error did not contribute to the verdict. In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 136, 385 P.3d 135, 140 (2016), (*holding that a jury instruction which instructed the jury regarding “a crime” vs. “the crime” for accomplice liability was not harmless error beyond a reasonable doubt*) citing State v. Brown 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002), (*citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*)).

In the case at bar, the instruction was harmless because the instruction did not relieve the State of its burden to prove each of the essential elements of the offense. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002).

Both parties are entitled to have the jury instructed on their theory of the case if there is evidence that would support the theory. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997), State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The Court’s instruction on value, while containing language intended for a common scheme or plan regarding aggregating damages on multiple days or from multiple business establishments as contemplated under RCW 9A.56.010(21)(c), is nonetheless an

accurate statement of the law under the facts of the case at bar. The instructions accurately state the law of the case, irrespective of the language included in the value instruction regarding common scheme or plan and allowed each side to argue their theory of the case. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999).

The law on theft is well settled that "[w]hen several articles of property are stolen by the defendant from the same owner at the same time and at the same place, only one larceny is committed." *State v. Carosa*, 83 Wn.App. 380, 382-383, 921 P.2d 593, 594 (Div. II, 1996).

To charge defendant with multiple offenses under the facts of the case at bar would violate defendant's protection against double jeopardy guaranteed by the U.S. Constitution and the Washington State Constitution. U.S. Const. Amend. V; (*made applicable to the states by the U.S. Const, Amend. XIV.*) Wash. State Const. art. I, sec. 5, *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The value of property for theft second degree is an element of the offense which the State must prove to the trier of fact beyond a reasonable doubt. *State v. Williams*, 199 Wn. App. 99, 398 P.3d 1150 (Div. III, 2017), *State v. George*, 161 Wn.2d 203, 164 P.3d 506 (2007). In the case at bar, the sole issue on the Theft Second

degree count was whether the jury should value the property as the wholesale or retail cost. The court properly instructed the jury regarding both parties arguments on the issue of value by including a lesser included instruction of third degree theft as proposed by the defense.

IV. CONCLUSION

The instruction to the jury regarding value and a common scheme or plan was, if error at all, harmless error beyond a reasonable doubt. The instruction was definitional and did not impact the State's burden of proving the element of a value in excess of the required amount for a conviction on Second Degree Theft. The instructions as a whole properly instructed the jury on all the elements of the offense charged by the State. Further, the instruction did not impact the parties ability to argue their respective theories on the evidence regarding the proper method the jury should apply for valuation.

The State respectfully contends the Court must affirm the jury verdict.

Respectfully submitted this 12th day of February, 2018.

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PROOF OF SERVICE

I, Deborah K. King, do hereby certify under penalty of perjury that on 12th day of February, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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